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NTSB Order No. EA-5308

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 14th day of August, 2007

_____)	
MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket No. SE-17396
v.)	
)	
CHRISTIAN G.T. NADAL,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision and order of Administrative Law Judge Patrick G. Geraghty, issued June 14, 2006, in this matter.¹ The Administrator's order suspended respondent's airline transport pilot certificate for

¹ A copy of the initial decision, an excerpt from the hearing transcript, is attached.

60 days, based on alleged violations of 14 C.F.R. §§ 91.123(b)² and 91.13(a).³ The law judge determined that respondent had violated both regulations, but concluded that the Administrator had not proven every allegation in her order. As such, the law judge reduced the suspension period to 40 days.⁴ Respondent appeals the law judge's decision, and argues that the law judge allowed false testimony and evidence into the record at the hearing, that the law judge conspired with the Administrator, and that the law judge's factual conclusions were erroneous. We deny respondent's appeal.

The Administrator's April 27, 2005 order, which served as her complaint before the law judge, alleged that respondent acted as pilot-in-command (PIC) of a Learjet Model 25B for a flight departing from Chino Airport in Chino, California, on April 8, 2004, in which respondent did not comply with ATC instructions to taxi across runway 26R and turn left at taxiway Lima. The complaint alleges that respondent acknowledged the ATC instruction, but that respondent did not turn left at

² Section 91.123(b) states that, "[e]xcept in an emergency, no person may operate an aircraft contrary to an [air traffic control (ATC)] instruction in an area in which air traffic control is exercised."

³ Section 91.13(a) states that, "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

⁴ We note that the Administrator does not dispute the law judge's reduction in sanction.

taxiway Lima, and instead crossed runway 26L without a clearance from ATC. As a result, the Administrator's order charged respondent with operating contrary to an ATC instruction, and with carelessly operating the aircraft, in violation of §§ 91.123(b) and 91.13(a), respectively.

At the hearing, the Administrator called FAA Air Traffic Assistant Marcela Fleming, who observed and communicated with respondent's aircraft from the ATC tower at the time of the alleged events. Ms. Fleming testified that she was working in the "ground control" position at the ATC tower, in which she was responsible for monitoring and directing aircraft on the ground. Tr. at 11-12. Ms. Fleming testified that respondent was "getting too close to runway 26 left," and that she directed respondent's aircraft to stop after respondent proceeded to the middle of taxiway Lima, but that respondent continued rolling. Tr. at 20. Ms. Fleming also testified that the nose gear of respondent's aircraft was across the "hold short" bars of runway 26L. Tr. at 24. The Administrator also introduced into evidence an audiotape of the relevant ATC communications (Exh. C-1); a transcript of the communications (Exh. C-2); and a map of the Chino Airport (Exh. C-3), which Ms. Fleming annotated at the hearing to indicate the location at which she observed respondent's aircraft. Tr. at 21-23.

In response, respondent called his second-in-command (SIC), Mr. Christian Monti, who testified that he engaged in all ATC communications during the time at issue. Tr. at 45. Mr. Monti testified that a red enunciator door light came on while the aircraft was "on runway 26 right, as [it was] crossing 26 right." Tr. at 45-46. Mr. Monti testified that respondent applied the parking brake and got out of his seat to resolve the situation involving the light. Tr. at 46. While respondent was out of his seat, Mr. Monti testified that he was "looking at and loading up the GPS for the airplane for the trip," and that, when respondent stepped back into the cockpit, the aircraft slowly crept forward. Tr. at 48. As a result, Mr. Monti testified that he immediately applied the brakes, and that respondent said, "Stop! Stop!" Id. Mr. Monti testified that he does not believe that the aircraft crossed the hold short line (Tr. at 49), and annotated a map of the airport to demonstrate where the aircraft was located before it crept forward (Tr. at 53; Exh. R-2). In addition, respondent testified at the hearing, and stated that the nose of the aircraft "just barely went over the hold short line ... by a couple of feet at the most." Tr. at 58; see also Tr. at 63. Respondent also stated that the brakes worked normally after the aircraft crept forward. Tr. at 61-62, 73. Respondent asserted that he intended to comply with ATC's instructions, but that he did not

do so because he stopped at taxiway Golf (Tr. at 77), and that he could have made a left turn onto taxiway Lima, because he had "plenty of room" (Tr. at 79). Finally, respondent called Mr. Robert McGrath, who inspected the aircraft after the events at issue, and found air in the braking system of the aircraft. Tr. at 87; Exh. R-5. Mr. McGrath testified that brake problems with this model of aircraft are not uncommon (Tr. at 82-83), and that the door light that respondent noticed did not indicate that the door was in an unsafe condition (Tr. at 88).

After considering the evidence, the law judge held that respondent violated ATC instructions by passing the "hold short" line for runway 26L. Initial Decision at 114-15. The law judge rejected respondent's affirmative defense that the parking brake on the aircraft stopped working and caused the aircraft to creep forward while respondent was away from his seat in the cockpit checking on an enunciator light that had illuminated. Initial Decision at 117. The law judge noted that respondent had introduced a pilot deviation report that appeared to indicate that respondent's aircraft had not encroached on the "hold short" line, but determined that the Administrator's witness, who personally observed the event, was more credible than the report, whose author did not testify. Initial Decision at 118. On the other hand, the law judge found that the Administrator had not established that respondent "crossed" runway 26L, as her

complaint alleged, and reduced the sanction accordingly.

Initial Decision at 120. Overall, the law judge concluded that the Administrator proved that respondent violated §§ 91.123(b) and 91.13(a) by not complying with the ATC instruction to turn left at taxiway Lima, and that respondent had not met his burden of proving that an affirmative defense justified his actions.

Initial Decision at 119.

Respondent, who now proceeds pro se, presents a variety of arguments in his appeal.⁵ Respondent acknowledges that the nose of his aircraft "[a]t the very most ... extended over the hold short line [for runway 26L] by one to two feet," and that ATC immediately instructed respondent's aircraft to cross runway 26L, but that ATC could have instructed respondent's aircraft, "to continue and make the left turn onto taxiway Lima to the full length of 26 left." Respondent's Br. at 4. Respondent challenges the law judge's credibility determinations, and argues that the Administrator should have presented evidence regarding his aircraft's brake system. On appeal, respondent seeks to introduce new evidence into the record regarding the brake system. Respondent also argues that his counsel was

⁵ We note that the Administrator, as described below, replied to respondent's appeal brief, in accordance with the Board's Rules of Practice. Respondent then submitted a response to the Administrator's reply, which is not consistent with the Rules of Practice regarding appeal briefs. 49 C.F.R. § 821.48. Therefore, we decline to consider respondent's additional pleading.

ineffective, in violation of the Sixth Amendment, and that the law judge conspired with the Administrator to obstruct justice. Finally, respondent argues that he did not commit a runway incursion, and that his SIC, who was communicating with ATC at the time of the events in question, never read back and accepted ATC's instruction to turn onto taxiway Lima. Based on these arguments, respondent urges us to overturn the law judge's decision. The Administrator opposes each of respondent's arguments, emphasizing that the fact that respondent failed to turn left at taxiway Lima is undisputed, and urges us to affirm the law judge's decision.

We find that respondent's arguments are without merit. First, respondent's constitutional arguments⁶ and assertions with

⁶ Respondent argues that his counsel provided ineffective assistance during the course of this case. We have previously recognized that the constitutional right to counsel applies to criminal prosecutions, and not administrative proceedings such as this one. Administrator v. Sacks, 1 NTSB 1894 (1972); see also Administrator v. Brown, 6 NTSB 1339, 1341-42 (1989). Moreover, respondent also appears to argue that the law judge deprived him of his right to due process by suppressing evidence. We have previously held that, where a respondent has had the opportunity to present and cross-examine witnesses at the administrative hearing, neither the law judge nor the Administrator has denied the respondent due process of law, as established by the Fifth Amendment. See Administrator v. Nowak, 4 NTSB 1716 (1984); Administrator v. Logan, 3 NTSB 767, 768 (1977); Administrator v. Smith, 2 NTSB 2527, 2528 (1976). The record for this case indicates that respondent had the opportunity to present evidence and cross-examine witnesses; furthermore, the law judge issued some rulings and factual determinations in respondent's favor. Tr. at 32 (ruling regarding Exh. R-1); Initial Decision at 120 (reduction in

regard to criminal law⁷ are baseless. Moreover, respondent's challenge to the law judge's credibility determinations with regard to Ms. Fleming's testimony is unpersuasive. We have long held that credibility determinations are "within the exclusive province of the law judge," unless the law judge has made such determinations "in an arbitrary or capricious manner."

Administrator v. Kocsis, 4 NTSB 461, 465 n.23 (1982); see also Administrator v. Smith, 5 NTSB 1560, 1563 (1986); Administrator v. Sanders, 4 NTSB 1062 (1983). As such, where parties challenge a law judge's credibility determinations, the Board will not reverse the determinations unless they are arbitrary, capricious, or clearly erroneous. Smith, supra, at 1563. The law judge concluded that Ms. Fleming's eyewitness testimony was more credible than the pilot deviation report (Exh. R-1) and the testimony of respondent and Mr. Monti. Respondent has failed to show the law judge's determination to be arbitrary, capricious, or clearly erroneous.

(..continued)
sanction). Overall, respondent's due process argument is not persuasive.

⁷ Respondent asserts that the law judge and Administrator conspired to obstruct justice, in violation of 18 U.S.C. § 1505, and commit perjury, in violation of 18 U.S.C. § 371. These allegations are without merit. We have previously recognized that disputes as to the facts of a case are a far cry from perjury or other such crimes. Administrator v. Ruhn, NTSB Order No. EA-3537 (1992).

In addition, respondent appears to argue that he did not fail to adhere to ATC's instructions, because his SIC did not accept ATC's instructions. The evidence on the record counsels against such a conclusion, because respondent's SIC, Mr. Monti, responded to ATC's instruction by stating, "crossing two six right at golf and taxiing full length two six left." Exh. C-2 at 3. Taxiing the "full length" of runway 26L requires aircraft to turn left at taxiway Lima, which is what ATC had instructed respondent to do. See Exh. C-3 (Airport Diagram). Further, respondent argues that the Administrator's counsel and witness at the hearing were untruthful with regard to their estimations of the width of runways 26R and 26L, as well as the distance between the hold short lines and the taxiway. We agree with the law judge's conclusions concerning the layout and estimated distances at the airport, and find that respondent has not shown how such distances support his argument that he did not fail to comply with ATC's instruction to turn left at taxiway Lima.

Respondent also asserts, apparently in the alternative, that his failure to comply with the instructions was justified, because his aircraft's brakes caused the aircraft to creep forward. In support of this affirmative defense in his appeal, respondent attempts to introduce additional evidence into the appellate record. We have previously held that parties may not attempt to alter or amend the factual record on appeal.

Administrator v. Baughman, NTSB Order No. EA-3640 (1992) (Order Denying Reconsideration); Administrator v. Cunningham, 5 NTSB 516, 517 n.3 (1985); Administrator v. McGee, 4 NTSB 251 (1982) (Order Denying Reconsideration); see also Administrator v. Gabbard, NTSB Order No. EA-5286 (2007) (Order Denying Motion to Augment Record of Appeal).⁸ With regard to respondent's argument concerning the brake system, respondent has not demonstrated that the law judge's rejection of this argument was erroneous. See Initial Decision at 117 (not crediting Mr. McGrath's testimony regarding the brakes, and recognizing that, "there's no indication that there was any difficulty with this aircraft applying the brakes at any time in its taxi out from the ramp area ... or [thereafter]"). In asserting an affirmative defense, the respondent must fulfill his or her burden of proving the factual basis for the affirmative defense, as well as the legal justification. Administrator v. Gibbs, NTSB Order No. EA-5291 at 2 (2007); Administrator v. Kalberg, NTSB Order No. EA-5240 at 3 (2006); Administrator v. Tsegaye, NTSB Order No. EA-4205 at n.7 (1994). In this case, respondent has done neither, and instead appears to argue that the Administrator has the burden of ruling out the fact that respondent's brakes had not caused

⁸ We note that, after the issuance of an opinion and order, the Board's Rules of Practice provide a mechanism by which the Board may consider newly discovered evidence that was not previously available. 49 C.F.R. § 821.50. This provision, however, does not apply to the case at issue here.

his failure to comply with the ATC instruction. Respondent's contention is flawed, as we have long recognized that it is incumbent upon the respondent to prove any affirmative defenses that may justify the alleged violations. Kalberg, supra, at 3.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's initial decision is affirmed; and
3. The 40-day suspension of respondent's airline transport pilot certificate shall begin 30 days after the service date indicated on this opinion and order.⁹

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

⁹ For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).